

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN NUMISMATIC ASSOCIATION,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 77-1179
	)	
RICHARD PICKER,	)	
	)	
Appellee.	)	

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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United States Court of Appeals
for the District of Columbia Circuit

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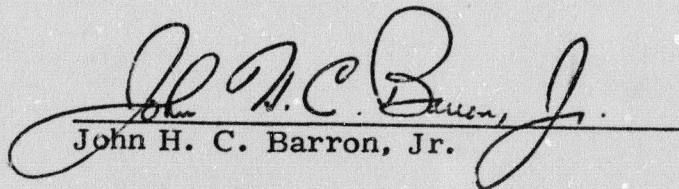
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Certificate required by Rule 8(c) of the General Rules of the United States
Court of Appeals for the District of Columbia Circuit:

The undersigned, counsel of record for appellee, certifies that only
the parties to this appeal, namely, appellant and appellee, have an interest
in the outcome of this case. These representations are made in order that
Judges of this Court may evaluate possible disqualification or recusal.


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Appeal from the United States District Court
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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the transaction complained of by appellee was a bailment for hire or a gratuitous bailment.
2. Whether the District Court abused its discretion in denying appellant's motions for a directed verdict and for judgment n.o.v.

This case was previously before this Court under the title Richard Picker v. Searcher's Detective Agency, Inc. and American Numismatic Association, No. 74-1718, at which time this Court reversed the District Court's refusal to submit Count I of appellee's complaint, which alleged simple negligence, to the jury and remanded for a jury trial on that count. The decision on such appeal is reported at 169 U.S. App. D.C. 345, 515 F. 2d 1316 (1975) (A8-16).^{*/} Counsel is not aware of any other case now pending in this Court, or which may be presented to this Court in the future, which is in any way related to this case.

REFERENCE TO PARTIES AND RULINGS

The parties to this appeal are: American Numismatic Association ("ANA"), appellant; and Richard Picker, appellee.

On remand, a jury trial was held before the Honorable William B. Jones on the issue of ANA's liability for simple negligence. On November 11, 1976, at the close of appellee's case, in a ruling from the bench Judge Jones denied defendant's oral motion for directed verdict. The jury subsequently returned a verdict in favor of appellee and Judge Jones entered judgment thereon (A18). On December 15, 1976, Judge Jones denied defendant's motion for judgment n. o. v. (A22). Appellant apparently appeals from both rulings.

^{*/} "A" refers to the Appendix previously filed herein.

STATEMENT OF THE CASE

The material facts in this case are not in dispute and are generally set forth in this Court's opinion in the previous appeal in this case (A9). The American Numismatic Association ("ANA"), in connection with its annual national convention to be held at a hotel in Washington, D.C. in August 1971 (the "convention"), arranged for the display and selling of coins, medals, paper money and like objects during the convention (A9). One of the services provided by ANA at the convention was a security room where valuables could be checked for safekeeping (Ibid.). Searcher's Detective Agency of Maryland, Inc. ("Searcher's") was engaged by ANA to furnish protection at the convention and security room for safekeeping of the displays when not on exhibit (A9). For these services Searcher's was paid a fee amounting to at least \$6,561.13 (A73-74). During the convention period employees of both ANA and Searcher's were in attendance at the security room (A9).

Use of the security room was "restricted to official convention badge holders only" (A76 ¶9). In return for payment of the \$250 "bourse table fee" required of each exhibitor at the convention, each exhibitor received, among other things, an official convention badge which entitled him to use the security room (A25, 70, 71). Appellee Richard Picker, a professional coin dealer, paid the \$250.00 "bourse table fee", received a registration badge, and was able to use the security room (A25, 33). Non-exhibitors attending the convention, such as Mr. Picker's wife, also had to pay a fee for obtaining an official convention badge which, among other things, entitled them to use the security room (A26, 76 ¶2).

Neither Mr. Sullivan nor Mr. Jackson, the only witnesses other than Mr. Picker who testified at the second trial, have any knowledge as to whether persons attending the convention were required to pay a fee in order to obtain an official convention badge so that they could use the security room (A51, 52, 68). The only other testimony introduced at the second trial was the reading into the record of certain portions of the testimony of Mr. Charles Norwood at the previous trial in the case, which testimony is silent as to this question.

On the afternoon of August 14, 1971, the last day of the convention, Mr. Picker placed his collection in two attache cases and checked them at the security room. He returned to repossess the two cases the following day. Delivery was not made, for the two cases had disappeared. He sued both appellee ANA and Searcher's for the value of the collection (A9).^{1/}

The District Court denied ANA's oral motion for directed verdict at the close of Picker's case on November 9, 1976. The jury returned a verdict on November 10, 1976, in favor of appellee Picker upon a finding that ANA was negligent on its own and concurrently with Searcher's. The District Court entered judgment thereon on the same date (A18). ANA's motion for judgment n. o. v. was denied on December 15, 1976 (A22). ANA filed a notice of appeal on January 6, 1977 (A23).

^{1/} Searcher's consented to the entry of a judgment against it by default (A17), did not participate in the second trial, and is not a party to this appeal.

ARGUMENT

I. THE TRANSACTION COMPLAINED OF BY APPELLEE
WAS A BAILMENT FOR HIRE

The threshold issue on this appeal is whether the admitted bailment which occurred when appellee Picker checked his two attache cases into the security room at the ANA convention on August 14, 1971, was a bailment for hire or a gratuitous bailment. Appellant correctly points out in its brief (p. 3) that no money was actually collected at the security room during the convention for the privilege of use of that facility. However, appellant blindly ignores the "uncontradicted evidence" that all users of the security room were required to pay a fee in advance for the privilege of checking items for safekeeping. Thus, the evidence is that use of the security room was "restricted to official convention badge holders only" (A76), that in order for an exhibitor, such as appellee Picker, or a non-exhibitor to obtain such a badge it was necessary to pay a fee to ANA (A25, 26, 70, 71, 76), and that appellee Picker paid such fee in order to obtain the official convention badge which entitled him to use the security room (A25, 33).

A bailment for hire (one for the mutual benefit of the parties) is one where a consideration is paid by the bailor to the bailee and the amount of such consideration is immaterial. Atmore Truckers Ass'n. v. Westchester Fire Ins. Co., 218 F. 2d 461, 464 (5th Cir. 1955). Where a bailment is an

incident to the performance of services for which the bailee receives compensation or to the conduct of an ongoing business, it is a bailment for hire, even though the bailor does not actually pay the bailee for the storage of the article bailed. For example, in McDonald v. Leonard Bros., 134 S.W. 2d 460 (Tex. Civ. App. 1939), the owner of a department store maintained a "free" parking lot across the street from the store where automobiles could be parked without charge by both patrons and non-patrons of the store. A patron of the store parked her car in the lot and was given a claim check. When the patron returned to the parking lot to get her car and presented her claim check, it had disappeared. It was subsequently found in a damaged condition. The patron's mother (who owned the vehicle) brought suit against the store for the damage done and the court held that the bailment at the parking lot was a bailment for hire, even though no charge had been made for keeping the car; noting as follows:

"[I]t is equally clear that the reason appellee maintained this 'free' parking lot was because it believed business to its store would be enhanced, and further that if it had not so believed the 'free' parking lot would not have so been kept by it. We think that such a purpose by [the store], whether profitable or not, would be a sufficient consideration for the parking to take the case out of one of a pure gratuity."

134 S.W. 2d at 462. See also, Hotels Statler Co. v. Safier, 103 Ohio St. 638, 134 N.E. 460 (S.Ct. Ohio 1921) (missing trunk); Chickasha Cotton Oil Co. v. Radney, 172 Okl. 368, 45 P. 2d 54 (S.Ct. Okl. 1935) (missing cotton); Chickasha Cotton Oil Co. v. Markum, 169 Okl. 427, 36 P. 2d 946 (S.Ct. Okl. 1934) (same); Planters' Cotton & Ginning Co. v. Blackburn, 92 Okl. 15, 217 Pac. 395 (S.Ct. Okl. 1923) (same); Johnson v. B & N, Inc., 190 Pa. Super. 586,

155 A. 2d 232 (1959) (missing coat in restaurant checkroom); Citizens National Bank of Jasper v. Ratcliff & Lanier, 253 S.W. 253 (Tex. Com. App. 1923) (missing liberty bonds); Bill Bell, Inc. v. Ramsey, 284 S.W. 2d 244 (Tex. Civ. App. 1955) (missing boat, motor and trailer); Clark v. Tabers, 54 S.W. 2d 262 (Tex. Civ. App. 1932) (missing brooch); Warren v. Geater, 206 Ark. 518, 176 S.W. 2d 242 (S.Ct.Ark. 1943) (damage to automobile while in custody of garage); Kampf v. Yokell, 267 App. Div. 914, 47 N.Y.S. 2d 195 (1944) (missing coat from dressing room maintained by employer); Tinplate Purchasing Corp. v. Tuteur & Co., Inc., 25 Misc. 2d 330, 204 N.Y.S. 2d 809 (1960), mod. on other grounds, 12 A.D. 2d 434, 212 N.Y.S. 2d 303, revd., 10 N.Y. 2d 410, 223 N.Y.S. 2d 495, 179 N.E. 2d 502 (1961) (duty of bailee to defend against invalid attachment by third-party).

In the present case, ANA was obviously engaged in the ongoing business of sponsoring a numismatic convention (as it had for many years before) and maintained a security room for the convenience of the attendees as a necessary incident of the convention. Thus, whether or not any consideration was paid to ANA by appellee Picker specifically for the privilege of using the security room (and appellee submits that a portion of his \$250 "bourse table fee" was used to defray the expenses of maintaining the security room), the bailment created was a bailment for hire.

Appellee also submits that appellant is precluded from raising the gratuitous bailment question on this appeal because of the doctrines of res judicata and law of the case. During the first trial in this case, the following dialogue occurred between counsel for co-defendant Searcher's and the Court in the context of the Court's denial of both defendants' motions for directed verdict:

"MR. SCHALLER: Your Honor, at this time I would move the Court to direct a verdict for the defendant Searcher [sic] and against the plaintiff on the ground that plaintiffs have failed to establish a prima facie case either in the area of bailment or negligence, and taking all the evidence that has come in so far and all the reasonable inferences to be drawn therefrom, there is no evidence to support a verdict for the plaintiff.

THE COURT: Let me ask you about where you get this no bailment?

MR. SCHALLER: No bailment for hire, Your Honor. I didn't say no bailment, I simply say no evidence to support a judgment on either the bailment or the negligence aspect of the case.

THE COURT: No bailment for hire. We got here a contract entered into by Mr. Picker when he made application to come to the convention and he was advised at that time there would be a security room and \$250 was the registration fee.

MR. SCHALLER: That is correct, Your Honor.

THE COURT: You say that does not constitute bailment for hire?" (Transcript of April 3, 1974, pp. 781-82)

On the next day, while discussing his proposed charge, the Court had the following dialogue with counsel for appellant:

"MR. INTRATER: Your Honor, I respectfully suggest that it is not for the jury to determine what the status of the bailment was. There is no issue of fact here, that is strictly a matter of law. The facts are uncontested as to the nature of the bailment.

THE COURT: How could you say that? If you got a question about independent contractor---

MR. INTRATER: --I'm just talking about the nature of the bailment. There is no question here that there was no money paid by anybody to check in the goods.

THE COURT: There was \$250 paid to ANA and the security room.

MR. INTRATER: No, Your Honor.

THE COURT: I ruled on that yesterday."
(Transcript of April 4, 1974, p. 976)

Further, the District Court did not submit this issue to the jury, but instead simply instructed them that "as a matter of law there was an express signed contract of bailment." (Transcript of April 5, 1974, p. 1,033) Neither ANA nor Searcher's appealed from the District Court's ruling on this issue. Further, it is implicit in the opinion of this Court on the prior appeal that the transaction in issue was a bailment for hire, since if there was no bailment for hire, ANA could only be liable for gross negligence, Barclay, Inc. v. Maxfield, 48 A. 2d 768, 769 (D.C. Mun. App. 1946), and there would be no basis for this Court to have required a trial on the issue of ANA's liability for simple negligence.

Since this issue was determined by the District Court during the first trial hereof, such determination was not appealed, and this Court implicitly affirmed such ruling in its opinion on the previous appeal, appellant is now precluded from raising the issue by the doctrines of res judicata and law of the case. As stated in Bullen v. DeBretteville, 239 F. 2d 824, 829

(9th Cir. 1956):

"The fact that several questions were deferred for later decision does not render the doctrine of *res judicata* inapplicable. A case remanded for further hearing or over which jurisdiction is retained for some purposes may nonetheless be final as to other issues determined. Restatement of Judgments §41, Comment C, states,

'A judgment may be final as to some matters in litigation, although the litigation continues as to other matters.'"

A similar conclusion was reached in United States v. Brooks, 110 F. Supp. 175, 179 (D.N.J. 1953), affd., 210 F. 2d 257 (3rd Cir. 1954):

"Although this case was appealed and reversed on other grounds...the decision of the District Court in so far as it relates to the [individual plaintiff's] *qui tam* action as such, has never been reversed, and therefore [issues relating thereto] may be considered under the principle of *res adjudicata*, as having been adjudicated adversely to [him]."

See also, Ingalls v. Brown, 126 U.S. App. D.C. 266, 377 F. 2d 151, 153 (1957), where this Court upheld the District Court's finding that the plaintiff was properly discharged from military service but remanded for a further review of the type of discharge given, stating:

"The question is not whether this officer is to be separated from the service; the question is simply what type of discharge should be given. This decision and opinion are not to be regarded as *res judicata* of the entire controversy over this discharge."

Thus, appellant cannot now raise the issue of gratuitous bailment because of the doctrine of *res judicata*.

Appellant is similarly precluded from raising this issue by the doctrine of law of the case which the Supreme Court has noted is "kindred" to res judicata and "is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. United States Smelting, Refining & Mining Co., 339 U.S. 186, 198-99 (1950).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN DENYING APPELLANT'S MOTIONS FOR DIRECTED
VERDICT AND JUDGMENT N.O.V.

A motion for directed verdict and for judgment notwithstanding the verdict raise the same questions and are governed by the same standard when determined by the trial court and when reviewed on appeal. See, e.g., Liberty Mutual Ins. Co. v. B. Frank Joy Co., 297 F. Supp. 592 (1968), affd., 137 U.S. App. D.C. 343, 424 F. 2d 831 (1970); Lester v. Dunn, 154 U.S. App. D.C. 399, 475 F. 2d 983 (1973); Seganish v. District of Columbia Safeway Stores, 132 U.S. App. D.C. 117, 406 F. 2d 653 (1968); Calloway v. Central Charge Service, 142 U.S. App. D.C. 259, 261 n. 2, 440 F. 2d 287, 289 n. 2 (1971). This standard for review was set forth in Shewmaker v. Capital Transit Co., 79 U.S. App. D.C. 102, 103, 143 F. 2d 142, 143 (1944), where the trial court denied both a motion for directed verdict and judgment n.o.v., as follows:

"The rule applicable in the District of Columbia on a motion for a directed verdict, in an action founded upon negligence, is that the evidence must be construed most favorably to the plaintiff; to this end he is entitled to the full effect of every legitimate inference therefrom; if upon the evidence, so considered, reasonable men might differ, the case should go to the jury; if, on the other hand, no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted; a mere scintilla of evidence is not sufficient; the question is not whether there is any evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the onus of proof is imposed; the burden being upon the plaintiff to establish the negligence and injury alleged, if the evidence fails adequately to support either element the motion should be granted. The same rule is applicable on a motion to set aside the verdict [judgment n.o.v.] under Rule 50 of the Federal Rules of Civil Procedure."

Thus, the party moving for a directed verdict or judgment n.o.v. has a "heavy load". Guy v. First National Bank in Dallas, 393 F. 2d 371, 379-80 (5th Cir. 1968) (opinion by Wright, J., sitting by designation). Further, the decision whether to grant or deny such motions rests with the sound discretion of the trial court. See, e.g., Rhodes v. Metropolitan Life Ins. Co., 172 F. 2d 183 (5th Cir. 1949).

Applying the foregoing principles to the present case, it is apparent that appellant has totally failed to meet the "heavy load" required to justify a directed verdict or judgment n.o.v. As this Court stated in its opinion on the previous appeal in this case (A9), "The delivery of the attache cases to appellees [Searcher's and ANA], and their failure to return the bailed property when duly claimed, raised a prima facie case of [simple] negligence." This

presumption of negligence created a question of fact for the jury to decide as to whether ANA has shown that the failure to deliver was not caused by a lack of due care on its part. As stated by the court in Quinn v. Milner, 34 A.2d 259 (D.C.Mun.App. 1943), at 260:

"[P]laintiff was required initially to prove only the delivery and defendant's failure to return it upon demand. That established a prima facie case. . . . Having made out such a prima facie case, the burden of proof was cast upon defendant to account for failure to redeliver and to prove that his conduct was consistent with due care. That is the rule in the Federal courts in cases of orthodox bailments. . . . It has been described as a rule of necessity, for the owner can hardly be expected to know what happened. . . while it was in the care of a bailee. The bailee on the other hand would naturally and reasonably be expected to account for such loss or damage and to come forward with evidence to establish due care on his part and to show that the loss or damage occurred despite such care."

Here, appellant has not accounted for its failure to redeliver Mr. Picker's attache cases and has not proven that its conduct was consistent with due care. On the contrary, the ANA security chairman for the convention testified that while he knew in advance that "billions" of dollars of merchandise would be checked into the security room (Tr. 137), carts were checked into the security room containing as many as 15 bags and only one claim check was given for the entire cart (Tr. 143-44). He also testified that the use of cameras in connection with the security room (as was done at later ANA conventions) would have been a more efficient form of security (A295). In addition, the president of Searcher's testified that: his firm had no prior

experience with coin conventions (A174); that he knew there would be a lot of valuables checked into the security room, especially on the evening appellee Picker checked his cases once the convention was over (A180-81, 183); that some carts for which only one claim check was given were "massive" containing 20 to 30 bags (A201-2); that hotel bellboys were allowed into the security room to move such carts in or out (A202); and that security would have been improved had cameras been used as was discussed with ANA before the convention (A236). In spite of the large volume of very valuable coin collections to be checked, no partitions or other facilities were provided to keep each person's valuables separate so that there was nothing to prevent a person from lifting an extra bag and putting it on top of a cart containing numerous bags which were not separately tagged (A203).

In sum, not only has appellant totally failed to present any evidence that it was entitled to a directed verdict or judgment n.o.v., but, on the contrary, there is ample evidence of at least a prima facie case of negligence creating a jury question. Under such circumstances, it was not an abuse of discretion for the District Court to deny appellant's motions for directed verdict and judgment n.o.v.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that the bailment created when appellee checked his bags at the security room at the 1971 ANA convention was a bailment for hire, that the unexplained failure of appellant to return those bags upon proper demand by appellee, together with the other evidence referred to above, created at least a prima facie case of negligence which the District Court properly submitted to the jury, and that the District Court did not abuse its discretion in denying appellant's motions for directed verdict and judgment n. o. v.

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